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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR CONTRERAS,

Defendant and Appellant.

B163960

(Los Angeles County
Super. Ct. No. TA065795)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Steven C. Suzukawa, Judge. Affirmed.

Gary S. Kessler, under appointment for the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Hector Contreras appeals from the judgment entered following his convictions of assault with a firearm, carrying a concealed firearm, and carrying a loaded firearm. He contends the trial court abused its discretion by denying him probation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Hector Gonzales was acquainted with Hector Contreras (appellant). On July 17, 2002, Gonzales was talking with friends on the street. Appellant drove by several times before stopping his car and asking Gonzales where he was from. Gonzales responded with an obscenity. Appellant wanted Gonzales to enter his car so they could go somewhere and fight. Gonzales refused and the two men exchanged blows. Appellant said he would return with some friends and left.

Gonzales went home and telephoned a friend for help. He then went outside and encountered appellant, who displayed a gun. Appellant pointed the gun three to four inches from Gonzales's face and said: "Okay. Now what?" Gonzales saw the hammer of the gun was pulled back. He pushed the gun away, told appellant to take it home, and offered to fight him without weapons. Appellant said he was not going to use the gun and walked away. Police officers stopped and searched appellant. They arrested him after finding the gun.

Appellant was charged by amended information with assault with a firearm, making a criminal threat, carrying a concealed firearm and carrying a loaded firearm. (Pen. Code, §§ 245, subd. (a)(2); 4221; 12025, subd. (a)(2); 12031, subd. (a)(1).) Trial was by jury. Appellant was found guilty of the offenses, except for making a criminal threat on which the jury deadlocked. The court declared a mistrial on that count and ultimately dismissed it.¹

At sentencing, the court announced that it had read the original probation report and the supplemental probation report recommending probation, as well as a letter written by appellant and several letters submitted on his behalf. After counsel argued, the court decided against a grant of probation. The court found the mitigating factors of

¹ A second information was filed against appellant, charging five counts arising from an unrelated June 29, 2002 incident. The two cases were ordered consolidated for trial. The jury deadlocked on all June 29, 2002 counts. A mistrial was declared and the counts were eventually dismissed. Those charges are not the subject of this appeal.

appellant's lack of a prior record and efforts to help his family and himself were outweighed by aggravating factors of the potential violence and demonstrated premeditation of the offense. The court observed: "[U]nder these circumstances, where an individual walks up to an unarmed person, points a gun at his face – a loaded gun, that is not probationary conduct." The court was also troubled by appellant's failure to "own up" to the crime. Appellant's request for probation was denied and he was sentenced to an aggregate state prison term of eight years.

DISCUSSION

Standard of Review

The trial court enjoys broad discretion in determining whether a defendant is suitable for probation. (See, e.g., *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; *People v. Welch* (1993) 5 Cal.4th 228, 233.) The trial court also has broad discretion in evaluating the factors in aggravation and mitigation in making that determination. (See, e.g., *People v. Roe* (1983) 148 Cal.App.3d 112, 119.) To establish abuse, the defendant must show that, under the circumstances, the denial of probation was arbitrary or capricious. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831; see also, *People v. Welch, supra*, 5 Cal.4th at p. 234.)

Denial of Probation Was Not an Abuse of Discretion

In the instant case, appellant was presumptively ineligible for probation pursuant to Penal Code section 1203, subdivision (e)(2) because he used a deadly weapon to commit the offenses for which he was convicted.² Thus, he could not be placed on probation unless his was an unusual case and the interests of justice would best be served

² Penal Code section 1203, subdivision (e), provides in pertinent part that: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted. . . ."

by granting probation. When a defendant is presumptively ineligible for probation, the trial court should first consider the factors set forth in rule 4.413(c) of the California Rules of Court to evaluate whether the statutory limitation on probation is overcome. These include facts relating to the basis for the limitation on probation and facts limiting defendant's culpability.³ If the court determines that the statutory limitation is overcome, then it should apply the criteria in rule 4.414 to decide whether to grant probation. (Cal. Rules of Court, rule 4.413 (b).)

Appellant argues that his is an unusual case, and that a grant of probation is warranted pursuant to Penal Code section 1203, subdivision (e), and California Rules of Court rules 4.413 and 4.414.⁴ He also maintains the trial court abused its discretion by not considering the statutory criteria, resulting in reversible error. We disagree.

The trial court ignored rule 4.413 and turned directly to the criteria in rule 4.414. The court noted appellant's lack of a prior criminal record (rule 4.414(b)(1)) and balanced against that factor in mitigation several factors in aggravation: The nature, seriousness and circumstances of the crime as compared to instances of the same crime (rule 4.414(a)(1)); the manner in which the crime was carried out reflecting criminal sophistication or professionalism on the part of appellant; (rule 4.414(a)(8)); and that appellant was an active participant (rule 4.414(a)(6)) who used a weapon (rule

³ Pursuant to California Rules of Court, rule 4.413 (c), facts relating to the basis for the limitation on probation include whether the circumstance giving rise to the limitation on probation is substantially less serious in this case than is typically present and whether the current offense is less serious than a prior felony that is the cause of the limitation. Facts relating to defendant's culpability include whether defendant participated in the crime under great provocation or coercion not amounting to a defense, whether the crime was committed because of a mental condition not amounting to a defense, and whether defendant is youthful or aged and has no significant record. (Cal. Rules of Court, rule 4.413 (c).)

⁴ All further rule references are to the California Rules of Court.

4.414(a)(2)) on the vulnerable victim (rule 4.414(a)(3)) and failed to show remorse (rule 4.414 (b)(7)).

The trial court's failure to evaluate the criteria of rule 4.413 could only have worked to appellant's benefit. Indeed, given the trial court's remarks regarding the circumstances of the offense, the record would have supported a determination that the presumption was not overcome, had the court expressly made that determination on the record. In any event, the court's comments, and the evidence which supports them, justify its finding that appellant was not a suitable candidate for probation under the criteria of rule 4.414. Probation is, after all, not a right, but a privilege. (*In re York* (1995) 9 Cal.4th 1133, 1150.)

Appellant asserts that the trial court did not consider proper mitigating factors of (1) his youth, (2) his physical and mental health, (3) his lack of alcohol or substance abuse, (4) his strong family ties, (5) his need to support his mother, and (6) his current employment and willingness of his employer to retain him relative to rule 4.414. However, these factors were assessed in the supplemental probation report and defense counsel argued most of them in mitigation as justifying a grant of probation. A trial court has no obligation to make an express statement of reasons as to why it deemed proffered factors in mitigation nonexistent or insignificant. Thus, unless the record affirmatively indicates to the contrary, a trial court is presumed to have considered all relevant criteria, including any mitigating factors. (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317.) The trial court's determination in this case did not ""exceed[] the bounds of reason, all of the circumstances being considered."" (*People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th 822, 831.) We find no abuse of discretion in its denial of probation.

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.